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No. 87-1784

In the Supreme Court of the United States

OCTOBER TERM, 1987

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

STEPHEN S. GRAY, TRUSTEE IN
BANKRUPTCY OF NEWBURY CAFE, INC.,
d/b/a 29 NEWBURY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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I

QUESTION PRESENTED

Respondent accepts Petitioner's version of the question presented in this case as presented on page i of the Petition for a Writ of Certiorari.

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In Re Ron Pair Enterprises, Inc., 828 F.2d 367 (6th Cir. 1987), *cert. granted sub nom. United States* v. *Ron Pair Enterprises, Inc.*, __ U.S. __, 56 U.S.L.W. 3647 (No. 87-1043) 2

Statutes:

11 U.S.C. § 506(b) ..... *passim*

§ 552(b) 3

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To the Honorable William J. Brennan, Jr., Associate Justice of the United States and Circuit Justice for the First Circuit:

Now comes Stephen S. Gray, the Trustee In Bankruptcy (the "Trustee") of Newbury Cafe, Inc. (hereinafter the "Respondent") and respectfully submits the within Brief In

Opposition to Petition For Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case, and respectfully requests that the Court deny the petition filed by the Commonwealth of Massachusetts (hereinafter the "Petitioner") in the above-referenced case.

III. OPINIONS BELOW

Respondent accepts the version of the opinions below presented on page 1 of the Petition for a Writ of Certiorari.

IV. JURISDICTION

Respondent accepts the Petitioner's statement of jurisdiction presented on page 2 of the petition.

V. STATUTE INVOLVED

Respondent accepts the statute presented on page 2 of the petition as the statute involved in this case.

VI. STATEMENT OF THE CASE

The Respondent adds to the statement of the case presented by the Petitioner beginning on page 2 of the instant petition.

Respondent emphasizes that the First Circuit's decision upholding the well-established pre-Bankruptcy Code rule that postpetition interest is payable only on "claims secured by bargained-for or consensual liens" (Petition at A. 7) was based squarely on the long-respected notion that "if Congress intends . . . to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic National Bank* v. *New Jersey Department of Environmental Protection*, 474 U.S. 494, 501 (1986); see also *In Re Ron Pair Enterprises, Inc.*, 828 F.2d 367, 370, 372-73 (6th Cir. 1987) (where the Court of

Appeals for the Sixth Circuit relied on this settled principle of statutory construction as grounds for denying taxing authority's claim to postpetition interest). After a full consideration of the issues in this case based upon well-established principles of statutory construction, the First Circuit found no congressional intent to upset pre-Code bankruptcy law.

VII. REASONS WHY THE PETITION SHOULD BE DENIED

A. The First Circuit Reasonably and Fairly Applied a Long Respected Method of Statutory Construction and Merely Adopted an Established Concept of Bankruptcy Law.

The question presented in this case is whether section 506(b) of the Bankruptcy Code entitles a creditor to receive postpetition interest on an oversecured claim allowed in a bankruptcy proceeding, or more specifically, whether an oversecured nonconsensual lienholder such as the Massachusetts Department of Revenue may receive postpetition interest in a bankruptcy proceeding.

The First Circuit, in a thorough examination of the issue, correctly and fairly applied the settled principle of statutory construction followed in *Midlantic National Bank*. The court reasonably found that a comma placed before the conjunction "and" in section 506(b) simply did not reveal a specific congressional intent to upset established bankruptcy law, especially in light of congressional familiarity with existing law as evidenced by Congress' *specific* preservation in sections 552(b) and 726(a)(5) of the Bankruptcy Code of two pre-Code exceptions to the general rule disallowing postpetition interest (Petition at A. 10, 11).

Respondent asserts that the First Circuit's conclusion was a fair, balanced and rational conclusion, and that nothing has

been shown by the petition to warrant reexamination of the First Circuit's reasonable application of settled principles of statutory construction.

B. The Assets of the Debtor's Estate Are Limited

The Trustee notes that the Massachusetts Department of Revenue, by pursuing appeals from the bankruptcy court's order of April 16, 1987, has delayed the closing of the debtor's estate for over a year at considerable cost to that limited estate. The Respondent respectfully submits that continued delay will further inure to the detriment of the estate's creditors including the Internal Revenue Service and the Massachusetts Division of Employment Security.

C. The Issues Presented in the Petition For Certiorari Are Already Before the Court in Another Case

As Petitioner notes in the instant petition on page 1, the "question presented in this case is the same as that presented in *United States* v. *Ron Pair Enterprises, Inc.*, (No. 87-1043), in which the [C]ourt has already granted a writ of certiorari."

Respondent respectfully submits that the Court should not be overburdened by unnecessary consideration of cases involving identical issues. Respondent notes that the Commonwealth of Massachusetts could have filed an amicus curiae brief with the Court in support of the United States in the case of *Ron Pair*, however Petitioner is now barred from doing so because the filing date for briefs in support of the United States was June 4, 1988.

VIII. CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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29 NEWBURY,

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Dated: June 9, 1988